

Internal Revenue Service

**memorandum**

TL-N-5827-88

WHEARD CC:TL:TS

date: JUL 22 1988

to: Chief, Atlanta Appeals AP:ATL

from: Director, Tax Litigation Division CC:TL

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subject: Statute Extensions on Behalf of S Corporations

This is in response to your inquiry of dated April 11, 1988 which was received in this office on May 2, 1988.

ISSUES

1. Whether a nonshareholder corporate officer can sign the statute extension even though that person is not the tax matters person.
2. Whether an S corporation may authorize a person other than the tax matters person to extend the period for assessment on behalf of all shareholders under I.R.C. § 6229(b)(1)(B).
3. Whether a nonshareholder corporate officer may be designated as TMP.

CONCLUSION

1. A standard power of attorney executed by a corporate officer may not be sufficient to allow a person to extend the period for assessment under section 6229(b)(1)(B) for all the shareholders in an S corporation regardless of whether the officer is also a shareholder.
2. The S corporation may designate a person to extend the period for assessment on behalf of all the shareholders in a procedure similar to that provided in Temp. Treas. Reg. § 310.6229(b)-1T provided that an officer and all shareholders sign the power of attorney. Alternatively, individual consents can be obtained from each individual shareholder under section 6229(b)(1)(A).
3. A nonshareholder corporate officer probably cannot be designated as TMP in the absence of regulations so providing.

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## DISCUSSION

### I. NONSHAREHOLDER CORPORATE OFFICER

I.R.C. § 6229(b)(1)(B), through the incorporating provision of section 6244, provides that the period for assessment with respect to S corporation items may be extended on behalf of all shareholders,

by an agreement entered into by the Secretary and the tax matters partner [person] (or any other person authorized by the partnership [S corporation] in writing to enter into such an agreement).

Thus, the period for assessment may be extended by the tax matters person or "anyone else authorized by the [S corporation] in writing to enter into such agreement." The issue at this stage is the manner in which an S corporation can authorize a person to extend the period for assessment with respect to all the shareholders.

Although under corporate agency law many potential people can bind the corporation, the application of that law is uncertain with respect to the manner in which a corporation can bind its shareholders as individual taxpayers under TEFRA proceedings. Just as shareholders cannot bind their corporation in their capacity as shareholders except through the voting of their stock, the corporation cannot directly bind shareholders absent a contractual agreement.

For instance, a corporate officer may normally bind the corporation in his capacity as an officer but may not directly bind shareholders although the actions of the officer may affect the value of the shareholder's interest in the corporation.

Contrast the situation in which any general partner can normally bind the other partners in the partnership who are all jointly liable for partnership actions and debts. Thus, a general partner inherently has authority to bind partners while a corporate officer does not have statutory authority to bind shareholders.

In making the provisions of TEFRA applicable to S corporations, Congress recognized that the inherent differences between these two types of entities had to be accounted for. Thus, Congress granted the Service regulatory authority to provide rules to take into account those differences. I.R.C. § 6244. To date, the Service has not promulgated regulations which provide for the manner in which an S corporation may authorize a non-TMP to extend the period for assessment under section 6229(b). Because neither a corporate officer nor shareholders

have inherent authority to bind other shareholders outside of TEFRA and their authority under TEFRA is still undetermined (until regulations are issued) extensions under section 6229(b)(1)(B) on behalf of all the shareholders should not be secured from corporate officers or shareholders.

## II. OTHER PERSONS AUTHORIZED TO SIGN EXTENSIONS

Subsection (d) of Temp. Treas. Reg. § 301.6229(b)-1, which provides for the manner in which a partnership may designate someone to extend the period for assessment, provides that a partnership may designate a person to extend the period for assessment on behalf of all partners with a statement

signed by all persons who were general partners at any time during the year or years for which the authorization is effective.

Thus, the regulation takes a conservative approach since under partnership law, just one general partner could potentially bind all the partners. Until regulations are issued with respect to S corporations we also recommend a conservative approach with respect to extensions of the period for assessment for S corporation items.

A power of attorney (POA) which complies with the above regulation but which is signed by an officer with power to bind the corporation and all shareholders will operate as a valid designation of a person to extend the period for assessment on behalf of all shareholders. Since it is signed by an officer, this should satisfy the requirement for an authorization by the corporation. Furthermore, such a document signed and filed by all the shareholders is the effective equivalent of individual POAs signed separately. Cf. I.R.C. § 6229(b)(1)(A). Thus an authorization signed by an officer and all shareholders and otherwise complying with the above partnership regulation should operate to validly designate a person to extend the period for assessment on behalf of all the shareholders.

It is possible that an S corporation officer can extend the period for assessment on behalf of all shareholders since he can act on behalf of the corporation and the corporation may be able to extend the period for assessment with respect to all shareholders under section 6229(b)(1)(B) as incorporated by section 6244. Until, a Court actually so holds, however, we do not recommend relying on a statute extension signed only by a corporate officer even if that officer is designated as the TMP (unless the officer who is designated TMP is also a shareholder).

### III. NONSHAREHOLDER CORPORATE OFFICER AS TMP

Section 6231(a)(7) only authorizes a partnership to designate a general partner as the tax matters partner, and, in the absence of such a designation, the general partner with the largest profits interest is the tax matters partner. The Service may designate a TMP if it determines it is impracticable to apply the largest profits interest rule.

Although section 6244 incorporates the above provisions by reference, there is no corporate equivalent to a general partner since no shareholder is personally liable for the debts of the corporation. Since 1983, the Service has provided, however, that any individual shareholder may be designated as TMP. See Instructions to Form 1120S. For the purpose of designating a TMP, in the absence of regulations providing otherwise, the term "shareholder" should be substituted for "general partner" for the purposes of section 6231(a)(7) as incorporated under section 6244. In the absence of regulations, an S corporation probably cannot designate an officer/nonshareholder as TMP.

If, however, a nonshareholder officer has been designated as TMP by the corporation, statute extensions under section 6229(b)(1)(B) should not be secured from such a TMP, but rather, should be secured as outlined above. Alternatively, consents should be secured from each shareholder individually under section 6229(b)(1)(A).

Please refer any questions you have regarding these issues to Bill Heard at FTS 566-3289.

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